Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Liders Porras

Petitioner,

v.

Eric H. Holder, Jr., United States Attorney General,

Respondent,

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

To establish eligibility for Cancellation of Removal, 8 U.S.C. §1229b(b), Mr. Porras testified to the hardship that will be faced by his United States Citizen children if he is removed to Boliva. Mr. Porras spoke of abandoning his children and wife in the United States because the living conditions in Bolivia are among the worst in the world. The Immigration Judge found that the standard for "exceptional and extremely unusual hardship" was not met and the Board of Immigration Appeals affirmed. The United States Court of Appeals for the Second Circuit denied review based on precedent that the hardship requirement is a discretionary determination. However, the plain statutory language does not make hardship discretionary, and the courts have jurisdiction to review hardship as they do for the other eligibility requirements of cancellation of removal.

The First Question Presented is:

1. Whether the "exceptional and extremely unusual hardship" requirement for cancellation of removal, 8 U.S.C. 1229b, is subject to judicial review.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing en Banc was not published in the Federal Reporter but may be found at *Porras v. Holder,* No. 08-1857-ag (2d Cir. Dec. 7, 2009), reprinted at Petitioner's Appendix (hereinafter "P.A.") 25a.

The opinion of the United States Court of Appeals for the Second Circuit, denying Mr. Porras's Petition for Review on his claims for Cancellation of Removal, was not published in the Federal Reporter but may be found at *Porras v. Holder,* No. 08-1857-ag (2d Cir. Aug. 28, 2009), P.A. 1a.

The decision of the Board of Immigration Appeals dismissing the appeal may be found at *In re Liders Porras,* No. A74 911 641 (B.I.A. March 24, 2008), aff'g No. A74 911 641 (Immig. Ct. Hartford, Conn. Sept. 26, 2006), P.A. 9a. The order of the Executive Office for Immigration Review, Hartford, Connecticut, denying Mr. Porras' applications for Cancellation of Removal may be found at *In re Liders Porras,* No. A74 911 641 (Immig. Ct. Hartford, Conn. Sept. 26, 2006), P.A. 15a.

Jurisdiction

The United States Court of Appeals for the Second Circuit denied Mr. Porras's Petition for Review on August 28, 2009. P.A. 1a. On December 7, 2009, the Court of Appeals denied Mr. Porras's motion for rehearing *en banc.* P.A. 25a. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions

Title 28, United States Code §2350 provides in relevant part:

> An order granting or denying an interlocutory injunction under section 2349 (b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254 (1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

Statement of the Case

Mr. Porras was born in Bolivia on February 9, 1966. He entered the United States as a visitor on September 17, 1989. P.A. 17a. Mr. Porras has five United States Citizen children, two of whom live with he and his wife, and three children that live with their mother. On September 26, 2006 Mr. Porras appeared before the Executive Office for Immigration Review in Hartford, Connecticut and requested relief in the form of cancellation of removal, 8 U.S.C. 1229b(b)(1), as well as a continuance for a visa number to become available. P.A. 16a -24a.

Eligibility for cancellation of removal requires: (1) physically presence in the U.S. for not less than 10 years immediately preceding the date of the application; (2) good moral character; (3) no convictions for an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3); and (4) establishing that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a United States Citizen or lawful permanent resident. *See* 8 U.S.C. §1229b(b)(1).

At the hearing of September 26, 2006, the central issue before the Immigration Judge was whether Mr. Porras established that his removal would result in "exceptional and extremely unusual hardship" to his United States Citizen children. P.A.16a-24a. Mr. Porras provided documents showing that Bolivia is one of the least developed countries in South America, with almost two-thirds of its people living in poverty. P.A.20a. He testified that there is a high occurrence of assaults and kidnapping. P.A.19a. Mr. Porras further testified that his family in Boliva has difficulty making enough money to feed their children or buy medicines. P.A.20a. However, in the United States Mr. Porras works as a night shift supervisor for a cleaning company and is able to provide his children with a modest, happy life. P.A.19a. As a result, Mr. Porras indicated that he would be forced to leave his wife and children in the United States if he was ordered removed to Bolivia.

The Immigration Judge found that Mr. Porras did not meet the hardship standard under 8 U.S.C. §1229b(b) because "this is the hardship that

necessarily happens when anyone or child is separated from their parent." P.A.22a. The BIA affirmed the IJ's decision. P.A.10a. Mr. Porras appealed the decision to the United States Court of Appeals for the Second Circuit, arguing that the IJ held him to higher standard than required by statue. The Second Circuit dismissed the Petitioner's appeal, relying on 8 U.S.C. 1252(a)(2)(B)(i) which precludes judicial review of "any judgment regarding the granting of relief under . . . 8 U.S.C. §1229b."

However, in *INS v. St. Cyr*, this Court held that the courts are not precluded from reviewing whether an alien is *eligible* for discretionary relief. 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In line with *St. Cyr*, the Second Circuit has held that "[o]btaining ... cancellation of removal is a two-step process. First, an alien must prove eligibility by showing that he meets the statutory eligibility requirements. Second, assuming an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether to grant or deny relief." *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir.2006)(per curiam)(citiations omitted); *see also*, *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir.2005).

However, despite the legal and statutory authority providing for review of eligibility determinations, the Second Circuit, and each of its sister circuit courts, has held that the requirement of "exceptional and extremely unusual hardship" is not subject to judicial review. The IJ's decision that the children would not suffer exceptional and extremely unusual hardship is a determination as to eligibility for cancellation of removal. Therefore, the Second

Circuit's decision is contrary to this Court's finding that there is a "distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307. The requirement of "exceptional and extremely unusual hardship" is an eligibility requirement for the discretionary relief of Cancellation of Removal and is subject to judicial review. *See, Id.*

Reasons for Granting the Writ

I. This Court should grant certiorari to consider whether "exceptional and extremely unusual hardship" is reviewable as an eligibility requirement for cancellation of removal under 8 U.S.C.1229b.

In the recent decision of *Kucana v. Holder*, this Court held that 8 U.S.C. 1252(a)(2)(B)'s proscription of judicial review applies only to the Attorney General's determinations made discretionary by statute. *Kucana v. Holder*, -- S.Ct. --, 2010 WL 173368, *9 (Docket No. 08-911)(January 20, 2010). However, the U.S. Court of Appeals for the Second Circuit dismissed the underlying Petition for Review based on circuit precedent that the hardship requirement for cancellation of removal was a discretionary determination, and therefore beyond the Court's jurisdiction to review. *See* 8 U.S.C. §1229b(b)(1)(D); 8 U.S.C. §1252(a)(2)(B). The statute creating cancellation of removal contains four requirements that must be established in order for an alien to be eligible for such relief. Once an alien has established eligibility, then the statute

provides that the Attorney General may exercise his discretion to grant or deny relief. *See* 8 U.S.C. §1229b(b)(1). The requirements for cancellation, including whether the alien has established hardship, are non-discretionary; the statutory language does not indicate that hardship is discretionary, other sections of the Immigration and Nationality Act specifically use language indicating discretion, and the BIA has created a legal standard for determining hardship. Therefore the Petition for Writ of Certiorari must be granted to interpret the statutory language of 8 U.S.C. 1229b(b)(1) and the requirement of "exceptional and extremely unusual hardship."

A. The Courts have judicial review over questions of law relating to cancellation of removal including whether an alien is eligible for relief.

The standard for Cancellation of Removal, under 8 U.S.C. §1229b, states that the Attorney General may cancel removal of a nonpermanent resident if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 1182 (a)(2), 1227 (a)(2), or 1227 (a)(3) of this title, subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a

> citizen of the United States or an alien lawfully admitted for permanent residence.

See 8 U.S.C. §1229b(b). These requirements must be met before an Immigration Judge may exercise his discretion to consider granting Cancellation of Removal relief. *See* 8 U.S.C. §1229b(b)(1).

The IJ's decision is subject to judicial review as regulated by 8 U.S.C. §1252. The jurisdiction stripping provision of § 1252(a)(2)(B)(i) states that a Court does not have jurisdiction to review "any judgment regarding the granting of relief under ... [8 U.S.C. § 1229b]." However, § 1252(a)(2)(D) also states,

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Therefore, the courts have jurisdiction over questions of law and constitutional claims relating to orders of removal, despite the fact that jurisdiction is otherwise precluded for discretionary decisions, including cancellation of removal.

In *INS v. St. Cyr*, this Court held that the courts are not precluded from reviewing whether an alien is *eligible* for discretionary relief. 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In *St.Cyr*, a permanent resident alien filed a petition for habeas corpus, seeking review of the BIA's decision that he was removable because he pleaded guilty to aggravated felony and was ineligible to apply for

discretionary relief from deportation. The United States District Court for the District of Connecticut determined that it had jurisdiction and the Circuit Court affirmed. Following a grant of certiorari, the Supreme Court, Justice Stevens, held that discretionary relief under § 212(c) was available for aliens whose convictions were obtained through plea agreements and who would have been eligible for relief at the time of their plea under the law then in effect. *Id.* at 326. More importantly to the case at hand, the Court held that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – which includes §1252 - did not deprive courts of jurisdiction to review the alien's habeas petition. *Id.* at 312 – 313.

In arriving at its decision, the Court opined, "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id.* at 307. Eligibility for relief, the Court found, is "governed by specific statutory standards" and provides for "a right to a ruling on an applicant's eligibility, even though the actual granting of relief was . . . a matter of grace." *Id.* at 308 (*citing Jay v. Boyd*, 351 U.S. 345, 353-354, 76 S.Ct. 919, 100 L.Ed. 1242 (1956)). The Court relied on its opinion in *Accardi*, where it held that "a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law." *Id.* (*citing, United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)).

Following *St. Cyr*, the Circuit Courts have held that 8 U.S.C. §1252 does not strip the courts of jurisdiction over questions of law relating to

cancellation of removal, including whether an alien is eligible for relief. In *Sepulveda v. Gonzales* the Second Circuit held that "8 U.S.C. § 1252(a)(2)(B) does not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien's *eligibility* for the relief specified in 8 U.S.C. § 1252(a)(2)(B)(i)." 407 F.3d 59, 62-63 (2d Cir.2005)(emphasis added); *see also*, *Rodriguez*, 451 F.3d at 62. Other Circuit Courts have agreed. *See, e.g.*, *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir.2008)(Holding that the court retains jurisdiction to review the nondiscretionary determinations underlying a denial of an application for cancellation of removal including whether the IJ properly applied the law to the facts in determining an individual's eligibility); *Hashish v. Gonzales*, 442 F.3d 572 (7th Cir.2006)(Holding that the court has jurisdiction to review nondiscretionary determinations relating to an alien's eligibility for relief); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir.2003)(Holding the same); *Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir.2006)(Holding that jurisdiction exists to consider whether an alien meets the physical presence requirement.); *Bermudez v. Holder*, 586 F.3d 1167 (9th Cir.2009)(Finding that whether a particular conviction is a deportable offense is a question of law that the Court reviews *de novo*). The circuit court precedent, providing for review of eligibility for cancellation of removal, squares with the language of §1252 and the holding in *St. Cyr*.

As a result, "[o]btaining ... cancellation of removal is a two-step process. First, an alien must prove eligibility by showing that he meets the statutory eligibility requirements. Second, assuming

an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether to grant or deny relief." *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir.2006) (per curiam) (citations omitted); *see also Mendez v. Holder*, 566 F.3d 316, 319 (2d Cir.2009)(*citing St. Cyr*, 533 U.S. at 307). The two step process requires an alien establish eligibility before the Court utilizes its discretion to grant or deny cancellation of removal. Therefore, an eligibility decision, which is subject to judicial review, is distinct from an exercise of discretion.

B. A plain reading of 8 U.S.C. §1229b(b)(1)(D) shows that the hardship requirement is not a discretionary determination.

The plain language of the "exceptional and extremely unusual hardship" requirement shows that such a determination is not discretionary. Furthermore, the BIA has created a legal standard to apply in making a hardship determination – an indication that such a decision is not discretionary. Likewise, Congress has used specific language to invoke the Attorney General's discretion in other sections of the Immigration and Nationality Act (INA), and such language is purposefully excluded from the requirement of "exceptional and extremely unusual hardship."

The Second Circuit has incorrectly held that the hardship requirement is not reviewable. *See, e.g., Barco-Sandoval v. Gonzales*, 516 F.3d 35, 39 (2d Cir.2008)(Holding that whether exceptional and extremely unusual hardship is present is committed to the discretion of the Attorney General and is beyond the court's jurisdiction to review; *see also*

Fernandez v. Gonzales, 439 F.3d 592, 603-04 (9th Cir.2006)(holding the same); *Sung v. Keisler*, 505 F.3d 372 (5th Cir.2007)(holding the same); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219 (11th Cir.2006)(holding the same). The Second Circuit bases its decision on a finding that exceptional and extremely unusual hardship is discretionary.

To the contrary, the language of §1229b does not indicate that hardship is a discretionary determination. The plain language of §122b does not differentiate between each of the four requirements. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809(1989)("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") As with the other statutory requirements, a decision as to hardship must be decided using the applicable legal standards.

Under the Administrative Procedure Act, 5 U.S.C. 701(a)(2), a decision is committed to agency discretion when there is "no law to apply." *See Heckler v. Chaney*, 470 U.S.C 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d. 714 (1985)(internal quotations omitted). However, the BIA has created a legal standard for reviewing a hardship determination. The legal standard was set forth by the Board of Immigration Appeals in a trifecta of decisions. *See and compare, In Re: Gonzalez Recinas*, 23 I&N 467 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); and *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

In *Recinas*, the BIA issued a detailed decision that analyzed its past precedents on the issue of Cancellation of Removal and determined that it was not "so restrictive that only a handful of applicants,

such as those qualifying relatives with a serious medical condition, will qualify for relief." *Id.* at 470. The BIA emphasized that "the alien need not show that such hardship would be unconscionable." *Id.* at 468 (citations and quotations omitted). In contrasting the factual situations of its prior decisions, *Monreal* and *Andazola,* the BIA determined that an IJ should nod toward granting Cancellation where it is not practicable for the United States Citizen child to live in the foreign country because it would mean living in poverty, not being able to communicate in the native language, and separation from family and established support networks. *Recinas*, 23 I&N at 471. The Board also recognized the importance of considering whether the United States Citizen would ever be able to have his parent visit again in the United States. *Id.* at 472. In a very balanced decision, the BIA distinguished between situations where denying an application for cancellation would mean a simple relocation for the United States Citizen child and a lateral relocation. Therefore, the hardship requirement is not a purely discretionary determination because there is law to apply.

As this Court recently held in *Kucana v. Holder*, section 1252(a)(2)(B)'s proscription of judicial review applies only to Attorney General determinations made discretionary by statute. *Kucana v. Holder*, -- S.Ct. --, 2010 WL 173368, *9 (Docket No. 08-911)(January 20, 2010). The requirement of exceptional and extremely unusual hardship in 8 U.S.C. §1229b is not made discretionary by the language of the statute. The alien must establish hardship, under the legal standard articulated by the BIA, and then, if all the

requirements are met, the statute provides that the Attorney General may use his discretion to grant or deny relief.

Other areas of the INA use language that specifically implicates the Attorney General's discretionary authority. "In contrast, other sections of the INA require that an alien establish extreme hardship 'in the opinion of the Attorney General' or 'to the satisfaction of the Attorney General.' This language was used for suspension of deportaion, the predecessor of the current cancellation of removal law. But it was not included with respect to cancellation. *See* 8 U.S.C. 1254(a)(1)(suspension of deportation)(repealed 1996); 8 U.S.C. §1182(i)(1)(§212(i) relief)." *Mendez v. Holder*, 566 F.3d 316, 321 (2d Cir.2009). On the other hand, the hardship requirement simply states that an alien must "establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. §1229b(b)(1)(D). This Court has held that where Congress specifically includes particular language in one section of a statue but omits it in another "it is generally presumed that Congress acts intentionally an purposely in the disparate inclusion or exclusion." *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *see also*, *Mendez*, 566 F.3d at 321 (Citing the decision of *Russello* for the proposition that the language which is lacking as to cancellation of removal suggests a difference between the statutes.) In addition, the Court generally entertains a "presumption favoring interpretations of statutes [to] allow judicial review

of administrative action." *Reno v. Catholic Social Services*, Inc., 509 U.S. 43, 63-64 (1993)(internal quotations omitted).

In *Mendez*, the Second Circuit opined, "Were we operating on a clean late, we would be inclined to hold that the question of whether an alien has established exceptional and extremely unusual hardship is a determination that we have jurisdiction to review . . . We are, however, bound by prior decisions of our Court." 566 F.3d at 322. Therefore, the Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari to resolve whether "exceptional and extremely unusual hardship" is a non-discretionary determination subject to judicial review.

Conclusion

The Petition for writ of certiorari should be granted.

Respectfully submitted,
Petitioner Liders Porras

By counsel,
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APPENDIX A

08-1857-ag
Porras v. Holder

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABSE HICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/),THE PARTY CITING A SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE

SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVALABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDEE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of August, two thousand nine.

Seal:
United States Court of Appeals
Second Circuit
Filed
August 28, 2009
Catherine O'Hagan Wolfe, Clerk

PRESENT:

AMALYA L. KEARSE,
ROBERT D. SACK,
DEBRA ANN LIVINGSTON,

Circuit Judges.

LIDERS PORRAS,

Petitioner,

v. 08-1857-ag

ERIC H. HOLDER JR., * ATTORNEY GENERAL,
Respondent.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we have substituted Attorney General Eric H. Holder, Jr., for former Attorney General Michael B. Mukasey as the respondent in this case.

Appearing for the:	Glenn Formica, New Haven, CT.
Appearing for Apellee:	Matthew Spurlock, (Gregory Katsas, Assistant Attorney General, Barry J. Pettitano, Assistant Director, Jennifer Levings, Senior Litigation Counsel, Office of Immigration Litigation, of counsel) U.S. Department of

Justice,
Washington, DC.

Petition for review of an order of the Board of Immigration Appeals ("BIA") denying petitioner's motion to remand, and affirming an Immigration Judge's ("IJ") denial of petitioner's application for cancellation of removal and for a continuance in order to adjust status.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition be, and it hereby is, DISMISSED in part, and DENIED in part.

Petitioner Liders Porras, a native and citizen of Bolivia, petitions for review of a March 24, 2008, BIA decision, No. A74-911-641, denying Porras's motion to remand, and affirming the decision of an IJ dated September 26, 2006, denying his application for cancellation of removal under section 241(b) (1) of the Immigration and Nationality Act, ("INA") 8 U.S.C. § 1229b(b)(1) and his request for a continuance in order to pursue adjustment of his status under section 245 of the INA, 8 U.S.C. § 1255. We assume the parties' familiarity with the facts and procedural history of this case, and the issues presented by this petition.

We have held that "obtaining either adjustment of status or cancellation of removal is a two-step process. First, an alien must prove

eligibility showing that he meets the statutory eligibility requirements. Second, assuming an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether to grant or deny relief." Rodriquez v. Gonzales, 451 F.3d 60, 62 (2d Cir. 2006) (per curiam) (citations omitted). We have no jurisdiction to review an IJ's discretionary determination regarding either cancellation of removal or adjustment of status. See 8 U.S.C. § 1252 (a) (2) (B) ; see also Rodriguez, 451 F.3d at 62; Sepulveda v. Gonzales, 407 F.3d 59, 62-63 (2d Cir. 2005).

In order to demonstrate eligibility for cancellation of removal, an alien must show, inter alia, that his "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States . . . ." 8 U.S.C. § 1229b (b) (1) (D). We have held that the determination of whether exceptional and extremely unusual hardship is present for the purpose of cancellation of removal is committed to the discretion of the Attorney General, and that, accordingly, we have no jurisdiction to review such a determination. Barco-Sandoval v. Gonzales, 516 F.3d 35, 38-40 (2d Cir. 2008); see also De La Vega v. Gonzales, 436 F.3d 141, 144 (2d Cir. 2006).

The IJ denied Porras's application for cancellation of removal because he determined that Porras's United States-citizen children would not suffer the requisite exceptional and extremely unusual

hardship to grant him cancellation of removal. Because this is a discretionary decision, we have no jurisdiction to review it. See Barco-Sandoval, 516 F.3d at 38-40.

Even if we viewed Porras's petition as presenting a question of law, we would still lack jurisdiction as Porras's contention is frivolous. See id. at 40. Porras argues that the IJ applied an incorrect legal standard by relying on the BIA's analysis in In re Monreal-Aquinaga, 23 I. & N. Dec. 56 (BIA 2001), which he argues has been replaced with a less stringent standard in In re Gonzalez Recinas, 23 I. & N. Dec. 467 (BIA 2002). But the IJ's finding was consistent with both Recinas and Monreal in finding that Porras has failed to show adequate hardship. See Barco-Sandoval, 516 F.3d at 40-41 (rejecting as "not even reaching] the level of being colorable" the assertion that Gonzalez Recinas constituted a departure from, rather than an application of, Monreal-Aguinaga).The IJ also denied Porras's motion for a continuance in order to apply for adjustment of status. The IJ stated that he would deny the application for adjustment of status, inter alia, in the exercise of his discretion, apparently based on views the IJ had about the potentially fraudulent nature of Porras's first marriage. He therefore denied the motion for a continuance. We have found "no basis for obligating the agency to grant continuances pending adjudication of an immigrant visa petition when there is a reliable basis to conclude that the visa petition or the adjustment of status will ultimately be

denied." Pedreros v. Keisler, 503 F.3d 162, 166 (2d Cir. 2007). Because the IJ would have denied the application for adjustment of status even if the continuance had been granted, the BIA did not err in upholding the IJ's denial of the motion for a continuance.

Similarly, the BIA was not required to grant the motion to remand to the IJ based on Porras's attaining a viable visa priority date in support of his application for adjustment of status. The IJ made it clear that he would have denied the application for adjustment of status on the basis of his discretion in any event.

Porras argues that the IJ erred by finding -- without the full record needed to make a proper determination -- that Porras engaged in marriage fraud. But the IJ did not err in relying on his understandable doubts about the nature of Porras's first marriage in deciding that he would not exercise his discretion to grant Porras's adjustment of status.

Because the denial of cancellation of removal was based on a finding that there was no exceptional or extremely unusual hardship, we have no jurisdiction to review this finding, and dismiss the petition, in relevant part. Because the denial of the motion for a continuance was based on the IJ's determination that if the continuance were granted, the application for adjustment of status would be denied in the exercise of discretion, we deny the

petition for review, in relevant part. Similarly, because the BIA did not err in declining to grant a motion to remand the case to the IJ to determine adjustment of status, because the IJ would have denied the application, we deny the petition, in relevant part.

For the foregoing reasons, the petition for review of the order of the BIA is hereby DISMISSED in part, and DENIED in part. Having completed our review, the petitioner's pending motion for a stay of removal is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/_____

APPENDIX B

Seal

U.S. Department of Justice

Department of Justice
Executive Office for
Immigration Review

Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

GLENN L. FORMICA, Esquire
27 Elm Street
New Haven, CT 06510-000

U.S. DHS/HAR
450 Main St,
Room 483
Hartford, CT
06103-3060

Name: PORRAS, LIDERS
A74-911-641
Date of this notice: 3/24/2008
Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
S/
Donna Carr
Chief Clerk

Enclosure
Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of
Immigration
Appeals

Falls Church, Virginia 22041

File: A74 911 641 - Hartford, CT

Date: MAR 24 2008

In re: LIDERS PORRAS

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Glenn L. Formica, Esquire

APPLICATION: Cancellation of removal under section 240A(b) of the Act; Adjustment of Status

The respondent, a 42-year-old native and citizen of Bolivia, appeals from the Immigration Judge's decision of September 26, 2006, denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). During the pendency of the appeal, the respondent filed a motion to remand seeking to apply for adjustment of status as the beneficiary of a third-preference employment-based immigrant visa petition with a current priority date. *See 8* C.F.R. § 1003.2(c)(4). The Department of Homeland Security (DHS) has not responded to the respondent's motion.

See 8 C.F.R. § 1003.2(g)(3): The respondent's request for oral argument will be denied. *See* 8 C.F.R. § 1003.1(e)(7). The respondent's appeal will be dismissed, and his motion to remand will be denied.

On appeal, the respondent argues that his removal will cause his five United States citizen children, now 5, 6, 10, and 12 years old, exceptional and extremely unusual hardship. The respondent has identified no clear error in the factual findings of the Immigration Judge on appeal. *See 8* C.F.R. § 1003.1(d)(3)(i). Instead, the respondent argues that the Immigration Judge applied a more rigorous hardship standard than the exceptional and extremely unusual hardship standard articulated in section 240A(b)(1)(D) of the Act. In addition, the respondent appears to argue that the facts of this case are analogous to *Matter of Recinas,* 23 I&N Dec. 467 (BIA 2002). We disagree.

In *Matter of Recinas, supra,* the respondent was a single mother who provided the sole support for her six children and had no immediate family remaining in Mexico. Here, the record reflects that the respondent is a married man with two United States citizen children, ages 5 and 6, who he testified would remain in the United States with their mother if he is ordered removed to Bolivia, where two of his sisters and a brother still live (Tr. at 26, 31, 41). The record reflects that the respondent also has three United States citizen children, ages 6, 10, and 12, from a previous relationship (Tr. at 31). Contrary to the respondent's assertion on appeal, the record reflects that the respondent has not seen these children since at least March 2003, and while he maintains that he makes weekly child support

payments, he provided no proof of such (*Compare* Resp. Br. at 2 *with* Tr. at 31-33, 40, 45-47). Thus, this case does not present the question of how a lower standard of living or adverse country conditions would affect the respondent's children in Bolivia, but rather what financial and emotional hardship they would face in the United States. When we consider all of the potential hardship factors in the aggregate, we affirm the Immigration Judge's conclusion that the respondent failed to establish that his children would suffer hardship that is substantially beyond the ordinary hardship that

would be expected when a close family member leaves the country. *See Matter of Monreal,* 23 I&N Dec. 56 (BIA 2001); *see also Matter of Andazola, 23* I&N Dec. 319 (BIA 2002). *Cf. Matter of Recinas, supra.* Accordingly, we affirm the Immigration Judge's decision, for the reasons stated therein, denying the respondent cancellation of removal under section 240A(b) of the Act.

On appeal, the respondent also argues that the Immigration Judge abused his discretion in refusing to grant a further continuance in this matter. We disagree. A decision to grant or deny a continuance is within the discretion of the Immigration Judge if good cause is shown. *See* 8 C.F.R. § .1003.29; *see also Matter of Silva-Rodriguez,* 20 I&N Dec. 448 (BIA 1992); *Matter of Perez-Andrade,* 19 I&N Dec. 433 (BIA 1987); *Matter of Sibrun,* 18 I&N Dec. 354 (BIA 1983). We review

discretionary determinations de novo. *See 8* C.F.R. § 1003.1(d)(3) GO. In this case, the record reflects that the respondent is the beneficiary of a third-preference employment-based immigrant visa petition with a priority date of March 13, 2003 (Exh. 3). On September 26, 2006, when the Immigration Judge denied the respondent's request for a further continuance in this matter, third-preference employment-based immigrant visas were available only to applicants whose priority date was earlier than March 1, 2002 (I.J. at 7; Tr. at 22). *See* Department of State Visa Bulletin, Vol. VIII, No. 97 (September 2006). On appeal, the respondent argues that the Immigration Judge was "far to *[sic]* pessimistic as to the productivity of both the Department of Homeland Security or the Congress in authorizing additional visa numbers." (Resp. Br. at 6). Be that as it may, the record reflects that the Immigration Judge also indicated that he would deny the respondent adjustment of status as a matter of discretion (I.J. at 7-8). In the United States Court of Appeals for the First Circuit, in whose jurisdiction this matter arises, it not an abuse. of discretion for an Immigration Judge to deny a request for a continuance based on his determination that the adjustment application would be denied on statutory grounds or in the exercise of discretion, notwithstanding the approval of the visa petition. *See Oluyemi v. INS,* 902 F.2d 1032 (1st Cir. 1990).

Finally, the respondent argues on appeal that the removal proceedings were unfair and violated his right to due process. While it is well-established that under the Fifth Amendment, aliens are entitled to due process of law in removal proceedings, in this case, the respondent appears to be seeking to cloak

his abuse of discretion arguments in due process garb. *See Reno v. Flores,* 113 S. Ct. 1439 (1993); *Yamataya v. Fisher,* 189 U.S. 86 (1903). However, mischaracterizing a discretionary determination as a constitutional violation does not necessarily make it so. In this case, we see no evidence that the respondent was denied a full and fair opportunity to present his claim for cancellation of removal under section 240A(b) of the Act.

Turning to the respondent's motion, we note that he asserts that he is *prima facie* eligible for adjustment of status as the beneficiary of a third-preference employment-based immigrant visa petition with a current priority date. *See Matter of Coelho,* 20 I&N Dec. 464, 471-72 (BIA 1992); *see also INS v. Doherty,* 502 U.S. 314 (1992). However, a motion to remand will not be granted unless the new facts alleged, together with facts already of record, indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues at a hearing. *See Matter of L-O-G-,* 21 I&N Dec. 413 (BIA 1996). Here, contrary to the respondent's assertion in his motion to remand(Resp. Mot. at 3), the Immigration Judge indicated that he would deny the respondent adjustment of status as a matter of discretion based on certain irregularities in the record relating to his previous attempt to adjust

his status based on his marriage to a United States citizen (I.J. at 1-3, 7-8; Tr. at 41-43, 47-48, 49-50, 57-61, 63-67; Exh 5, at pp. 172-174, 178-179, Exhs. 7-9).

We see no error in the Immigration Judge's exercise of discretion, and accordingly, find no basis to remand. *See Matter of L-O-G-, supra.*

ORDER: The respondent's appeal is dismissed and his motion to remand is denied.

S/ of Roger Pauley
FOR THE BOARD
3

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
Hartford, Connecticut

File A 74 911 641 September 26, 2006

In the Matter of

LIDERS PORRAS In Removal Proceedings
Respondent

Charge: Section 267 (a)(1)(B) of the Immigration and Nationality Act – nonimmigrant overstay;

Application: Cancellation of removal under Section 240A(b) of the Act; Motion for Continuance for availability of visa number.

On Behalf of the Respondent: On Behalf of DHS:

Glenn Formica,
27 Elm Street
New Haven, CT 06510

Patricia Flanagan,
Assistant District
Counsel,
Hartford, Connecticut

ORAL DECISION OF THE IMMIGRATION JUDGE

Introduction

The respondent admits the allegations in the Notice to Appear and concedes removability. Respondent seeks a continuance based on an approved 1-140 petition as well as cancellation of removal for non-permanent residents.

Statement of the Facts

The respondent was born in Bolivia on February 9, 1966. He entered the United States as a visitor on September 17, 1989. He apparently had a relationship with a Bolivian native named Carmen Garcia. They had a child born on May 12, 1995, in the United States. The respondent indicates he was at the hospital when the child was born, and his name appears on the birth certificate. He indicates that Carmen was his then girlfriend. However, the next day on May 13, 1995, he married a Sonia Cruz who is a U.S. citizen. Sonia Cruz filed a visa petition on behalf of the respondent in November of 1996. They were interviewed by CIS in July of 1997, and then they issued a notice of intent to deny, stating that there were inconsistencies and discrepancies between their two testimonies.

Then the respondent had another child born with Carmen Garcia, not his wife, on September 8, 1997. Then they had another child born on February 17, 2001. Respondent

was asked why he married this U.S. citizen when he had a daughter born with another woman the day before, and his answer was that they had already set a day but the respondent claims it was not a marriage entered into for Immigration benefits.

The respondent claims that he had lived with Ms. Cruz, but the record frankly says very little about how long and under what circumstances. The witness, Mr. Burgos, did not even know his first wife's name and met her five or six times, and did not know how long they lived, but stated that it was a good marriage that had its ups and downs. The respondent indicated that he may have been living on and off between both Ms. Garcia and Ms. Cruz.

The respondent then apparently then met his current wife and had a child with her on July 25, 2001, which led to the breakdown of this relationship with Ms. Garcia. Curiously, there is nothing about his relationship with his then wife. He divorced his wife on May 27, 2003.

The respondent claims that he has last seen his three oldest children born to Ms. Garcia about four years ago. He claims that he makes child support payments and has a visitation order but provided no proof to the Court. He states that he sends them $142 per week. He states that Ms. Garcia's husband

does not want him to see the children, and they make excuses.

The respondent then has two children born in 2001 and 2002 to his current wife that he married in October of 2003. His current wife is Bolivian and apparently out of status. The respondent states that he lives with his wife and two children. He claims that he does a lot of things together with his children.

The respondent states that he has two sisters and one brother in Bolivia, and apparently, a sister lives in the United States who is a permanent resident. He states that the economic situation is poor in Bolivia, and that it is hard to make a living. He states that he sometimes sends money to his siblings to help them out in Bolivia. The respondent indicates that he supervises a cleaning crew and works late afternoons and nights and sometimes during the day. He earns around $12 an hour. The respondent claims that he bought a house with his sister in March of 2005), but did not list it on the cancellation of removal application. He claims he owns it jointly, but did not provide any evidence that he owns the house.

He claims that if he had to be deported, his wife and two children would remain in the United States. He claims that the children would have a difficult time in Bolivia, and that they would have to live in his sister's small house. He claims that there is a lot of crime

and especially kidnapping, and he could not afford medical care for his children in Bolivia.

A witness names Jorge Burgos testified that he has known the respondent for around ten years, considers the respondent a good friend. He indicated that his first wife, Sonia, had a lot of problems when the respondent had children with another woman, but it is really unclear how long they lived together if at all. He indicates that he met his first wife at social events five or six times.

The, respondent provided a number of documents in the record including employment letter. He provided a few rental documents relating to his marriage to Sonia. He also showed that he has paid tax returns since 2001. He also provided a few documents regarding background conditions in Bolivia. These articles say almost nothing about the economic conditions in Bolivia. It indicates that Bolivia is one of the least developed countries in South America, and almost two-thirds of its people live in poverty. It states that Santa Cruz is the commercial industrial hub of the eastern lowlands and is experiencing rapid population and economic growth. It says that economic growth was estimated at four percent for 2005.

Statement of Law

To qualify for cancellation of removal under Section 240A(b) (1), the respondent must establish 10 years physical presence, good

moral character, and that his removal would result in exceptional and extremely unusual hardship to his U.S. citizen children.

Analysis and Findings

The respondent appears to meet the physical presence and good moral character requirements. The main issue is whether the respondent has established exceptional and extremely unusual hardship and the issue of discretion. The first issue is hardship to his three oldest children who were born to Carmen Garcia. The respondent indicates that he has not seen them for the last four years but sends them child support. He claims he has a visitation order but apparently has not seen the children. The respondent failed to provide the Court with the visitation order. He has also not provided a child support order or evidence that he paid child support. The Court has little information about what Carmen Garcia's economic status is. However, the Court finds that there is nothing close to exceptional and extremely unusual hardship if the respondent were to be deported to those three children. The court finds that the fact that he might not send $100 to them a week does not in itself establish exceptional and extremely unusual hardship. The Court tried to ask the respondent questions about what his ties are to these children, and the answer simply was not very clear. The Court simply finds that there is no evidence of exceptional and extremely

unusual hardship to these three children if the respondent were to be deported.

The next determination is whether there would be exceptional and extremely unusual hardship to his two younger children if he were to be deported. Respondent claims that if he were sent back to Bolivia, his wife and the two children would remain in the United States. The Court would note that the standard for exceptional and extremely unusual hardship is a very high one. The Board in Matter of Monreal, 23 I&N Dec. 56 (BIA 2001) held that the standard of exceptional and extremely is something considerably above the hardship normally found when a close family member is sent back to their native country. The Court does not find anything close to exceptional and extremely unusual hardship in this case. It appears that this would result in separation from their father. However, the Court finds no evidence that this is particularly exceptional or extremely unusual. This is the hardship that necessarily happens when anyone or child is separated from their parent. In addition, the Court would not find any exceptional and extremely unusual hardship if the children had to come with the respondent and their mother back to Bolivia where both of their parents are from. The Court again would find that there is no evidence that removal, although albeit to a country with lower living standards, does not rise to the level of exceptional and extremely unusual.

The Court would also deny this application in the exercise of discretion. The Court finds has serious doubts about the bona fides of his marriage to Sonia Cruz. This was expressed in the denial of the 1-130 petition, and it is not clear whether CIS was even aware or clued in to the fact that he had three children with a different woman during that marriage. However, listening to the respondent's testimony, the Court is not convinced at all that this was a bona fide marriage. In fact, he indicated when he had a child with his current wife, he said that that ended his relationship with Ms. Garcia, but made absolutely no statements about his then wife Sonia. Based on the facts of this case, there is a high probability that this was not a bona fide marriage. This record simply does not establish that it was a bona fide marriage. The Court finds that a fraudulent marriage to a U.S. citizen is a serious adverse factor. And the Court would also deny the application in the exercise of discretion.

The respondent also seeks a continuance for a visa petition, visa number to become available. It appears that that visa number is nowhere close. That priority date is in 2003, and the cutoff date for the category is in 2002. Furthermore, the Court finds that the court would also deny his adjustment in the exercise of discretion. The Court finds that there is no reason to continue the matter any further pending the potential availability of a visa

number. The respondent has not applied for any other relief from removal, and accordingly, the Court must order removal to Bolivia.

Orders

IT IS HEREBY ORDRED that the respondent's application for cancellation of removal under Section 241(b)(1) of the Act is denied.

IT IS FURTHER ORDERED that the respondent's motion for continuance for availability of an immigrant visa number is denied.

IT IS FURTHER ORDERED that the respondent be removed to Bolivia.

MICHAEL W. STRAUS
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08-1857-ag
Porras v. Mukasey
December 07, 2009

12/7/09	Order FILED DENYING Petition for rehearing and petition for rehearing en banc by Petitioner Liders Porras, endorsed on motion dated 10/16/2009. By FP, CD. [Entry date Dec 7 2009] [AB]

Certificate of Compliance

No.

Liders Porras

Petitioner

v.

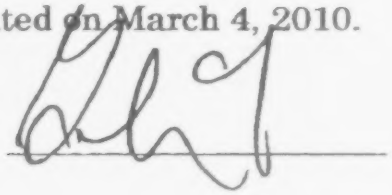
Eric H. Holder, Jr., United States Attorney General

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5,401 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2010.



Certificate of Service
No.
Liders Porras

Petitioner

v.

Eric H. Holder, Jr., United States Attorney General

Respondent

As required by Supreme Court Rule 29.5, I certify that all parties required to be served have been served with three copies of the petition for a writ of certiorari that:

Matthew A. Spurlock
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 514-0179

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2010.